(4)

No. 03-388

Supreme Court, U.S.
FILED
JUN 4 - 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DENNIS BATES; JIMMY BURSON; BENNY JUDAH, doing business as CLEARWATER FARMS; TOMMY COLEMAN; RICHARD COX; WAYNE DAVIS; NEIL FRIESSEN; JAKE FROESE; THOMAS FUSTON; ARTHUR GALVAN, doing business as G-5 PARTNERSHIP; GREG HUGHES, doing business as JH CATTLE CO.; RUDY KLASSEN; RONNIE LOVE; KEVIN MATHIS; BRAD PALMER; KIRK PARRISH, doing business as K-L FARMS; JERRY PARRISH; JOEVELYN PATTERSON and DONALD GRUBEN; STACEY PRICE; BENNY JUDAH, doing business as PEA-COT FARMS; BILLY SHANNON; FLOYD STOKES; CRAIG WEST; FRENCHIE LEE WHEELER,

Petitioners,

versus

DOW AGROSCIENCES LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Which, if any, state law crop injury claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-137?

TABLE OF AUTHORITIES

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CASES:

Am. Cyanamid Co. v. Geye, 79 S.W.3d 21 (Tex. 2002), *cert. denied*, 123 S. Ct. 2637 (2003) 1

Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281 (1970) 4

STATUTES:

7 U.S.C. § 136a(c)(10) 1

AMICUS BRIEFS:

Brief of Amicus Curiae the United States on Petition for a Writ of Certiorari, *Bates v. Dow Agro-Sciences LLC*, 332 F.3d 323 (5th Cir. 2002), *petition for cert. filed*, 72 USLW 3184 (2003) (No. 03-388) 3

OTHER AUTHORITIES:

OFFICE OF PESTICIDE PROGRAMS, U.S. EVTL. PROT. AGENCY, PESTICIDE REGULATION NOTICE 96-4 § 3 (June 3, 1996) 2

OFFICE OF PESTICIDE PROGRAMS, U.S. EVTL. PROT. AGENCY, PESTICIDE REGULATION NOTICE 97-3 (Sept. 4, 1997) 2

REASONS FOR GRANTING THE PETITION

In submitting its recommendation to this Court, the Solicitor General makes three assumptions. First, it assumes that Strongarm was registered and approved under 7 U.S.C. § 136a(c)(10), known as the Reduced-Risk Initiative ("RRI"). Second, it assumes that in the registration process, Respondent submitted efficacy testing data to the EPA. Finally, it assumes that the RRI process constitutes a regulation of efficacy. Petitioners assert that all three assumptions are wrong.

Regarding the first assumption, on page 16 of its Amicus Brief, the Solicitor General relies upon unsupported statements in Respondent's Brief in Opposition which claim that Strongarm was approved under the RRI.[1] Due to continuing proceedings before the Fifth Circuit, Petitioners no longer have access to the record to verify this claim. However, Petitioners do not believe that the record indicates that Strongarm was approved under the RRI. Evidence was admitted against Respondent in other litigation showing that Strongarm was not approved under the RRI, but rather was approved under a different fast track program for registration of conventional pesticides after being denied registration under the RRI.

[1] The Solicitor General finds this statement important because it supports the contention that the federal government regulates product efficacy in the pesticide approval process. Additionally, the Solicitor General uses Respondent's assertion that Strongarm was registered under the RRI to diminish the conflict between this case and the Texas Supreme Court's opinion in *American Cyanamid Company v. Geye*, 79 S.W.3d 21 (Tex. 2002), *cert. denied*, 123 S. Ct. 2637 (2003), and to show that this case does not meet the criteria for this Court to grant discretionary review.

The Solicitor General also assumes that Respondent submitted efficacy testing data in the RRI registration process. However, approval under the RRI is not contingent upon submission of efficacy data. OFFICE OF PESTICIDE PROGRAMS, U.S. EVTL. PROT. AGENCY, PESTICIDE REGULATION NOTICE 97-3 § 7 (Sept. 4, 1997). Furthermore, Petitioners believe this assumption about the data Respondent actually submitted to the EPA is unsupported by the record.

Finally, the Solicitor General assumes that the RRI process equates to EPA regulation of efficacy. An examination of the express language of Pesticide Registration Notice 97-3 directly contradicts this assumption. Although the EPA does request the applicant submit efficacy data, it emphasizes "that the Agency does not expect the applicant to perform any additional testing to derive the data necessary to develop rationales for the Reduced-Risk Program." *Id.* The EPA allows the applicant the option of not submitting efficacy data and instead explaining why submission of the efficacy data is unnecessary to the approval process. *See id.* The language of the RRI makes clear that submission of efficacy data is not a requirement to approval, and approval under the RRI does not guarantee that the EPA evaluated a product's efficacy.

In 1996, the EPA reminded those in the pesticide community that the "registration requirements [that a pesticide not be misbranded] should not be read as reintroducing efficacy concerns into the label approval process. Having directly given EPA the authority to disregard efficacy issues, Congress could not have intended that, once EPA exercised this authority, the same efficacy issues would come in through the back door of the label approval process." OFFICE OF PESTICIDE PROGRAMS, U.S. EVTL. PROT. AGENCY, PESTICIDE REGULATION NOTICE 96-4 § 3 (June 3,

1996). Today, however, the Solicitor General seems to argue exactly the opposite: "Congress's 1978 Amendments to FIFRA relieved EPA of any obligation to require registrants to submit efficacy data, but it did not relieve registrants of their obligation to submit accurate labeling for approval in the registration process, or immunize registrants from FIFRA's penalties for false or misleading labeling." Brief of Amicus Curiae the United States on Petition for a Writ of Certiorari, *Bates v. Dow AgroSciences LLC*, 332 F.3d 323 (5th Cir. 2002), *petition for cert. filed*, 72 USLW 3184 (2003) (No. 03-388) (internal citations omitted).

CONCLUSION

In this area of law, courts are divided not only on the outcome of their decisions but also on the proper analysis to apply in determining which state law tort claims are preempted. This issue has created discord between the federal and state judiciary for two decades and will continue to do so until settled by this Court. This Court has always recognized the dangers inherent in the separate state and federal legal systems.

> Understandably this dual court system was bound to lead to conflicts and frictions. Litigants who foresaw the possibility of more favorable treatment in one or the other system would predictably hasten to invoke the powers of whichever court it was believed would present the best chance of success. Obviously, this dual system could not function if state and federal courts were free to fight each other for control of a particular case.

Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 286 (1970). The assumptions made by the Solicitor General are inconsistent with the record evidence and the language of the relevant EPA provisions. This case presents the proper set of facts to make a final determination on an important question of federal law that has not been, but should be, settled by this Court.

Respectfully submitted,

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